DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration
Rockville, MD 20857

SENT VIA TELEFAX

Docket No. FDA-2010-N-0134

Dear ANDA Applicant:

We are writing to solicit comment on legal and regulatory issues pertaining to 180-day exclusivity as described in section 505(j)(5)(B)(iv) of the Federal Food, Drug, and Cosmetic Act for abbreviated new drug applications (ANDAs) for losartan potassium tablets and losartan potassium-hydrochlorothiazide tablets. Merck Research Laboratories (Merck) holds the NDAs for Cozaar (losartan potassium) tablets and Hyzaar (potassium-hydrochlorothiazide) tablets, the reference listed drugs for these ANDAs. You have an ANDA pending with FDA for one or more of these drug products.

Merck submitted U.S. Patent No. 5,608,075 to FDA for listing for the Cozaar and Hyzaar NDAs 20-386 and 20-387, respectively. Merck requested in March 2005 that FDA delist the patent for these drug products. The patent has remained listed in FDA's *Approved Drug Products with Therapeutic Equivalence Evaluations* (the Orange Book) for Cozaar and Hyzaar as a placeholder for any exclusivity that may result from an ANDA applicant's paragraph IV certification to the patent. The current Orange Book listing for U.S. Patent No. 5,608,075 shows a patent expiration date of March 4, 2014.

FDA has received the attached information asserting that the expiration date for U.S. Patent No. 5,608,075 was March 30, 2009. As described in the regulation at 21 CFR 314.53(f), persons disputing the accuracy or relevance of patent information submitted to the agency are requested to notify the agency in writing stating the grounds for disagreement. The agency then will request the applicable new drug application holder to confirm the correctness of the patent information submitted. Unless the application holder withdraws or amends its patent information in response to FDA's request, the agency will not change the patent information in the Orange Book.

Consistent with the regulation, FDA has forwarded the inquiry regarding the correct expiration date for U.S. Patent No. 5,608,075 to Merck. Eligibility for 180-day exclusivity based on U.S. Patent No. 5,608,075 is at issue in litigation currently pending in the U.S. Court of Appeals for the District of Columbia. See *Teva Pharmaceuticals USA, Inc.* v. *Sebelius*, No. 09-5281 (D.C. Cir. Mar. 2, 2010). The litigation schedule for this case and for FDA's consideration of the regulatory issues associated with related ANDAs is very time sensitive. Therefore FDA has notified Merck that it is essential FDA have accurate information about this patent as soon as possible, and requested that Merck respond by close of business on March 11, 2010.

As you may know, in the *Teva* case described above, the D.C. Circuit addressed the role of patent delisting in the forfeiture of exclusivity pursuant to section 505(j)(5)(D)(i)(I) of the Act. The court issued an opinion on March 2, 2010; the mandate has not yet issued.

FDA now has before it the assertion that U.S. Patent No. 5,608,075, the patent at issue in the litigation, expired on March 30, 2009. Because of the time sensitive nature of this issue, we are asking for comment on what effect, if any, a change in the patent expiration date for U.S. Patent No. 5,608,075 to March 30, 2009, would have on a first applicant's eligibility for 180-day exclusivity for losartan potassium tablets and losartan potassium-hydrochlorothiazide tablets.

To permit the agency to consider submissions in a timely manner, we are asking that you submit your comments to www.regulations.gov by close of business on March 18, 2010. Please include the proper FDA docket number, FDA-2010-N-0134, in your correspondence. If you have any questions regarding this correspondence, please contact Dave Read, Regulatory Counsel, Office of Generic Drugs, at 240-276-9310.

Sincerely,

{See appended electronic signature page}

Gary J. Buehler
Director
Office of Generic Drugs
Center for Drug Evaluation and Research

Attachments

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March 9, 2010

Gary J. Buehler, R. Ph.
Office of Generic Drugs
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7519 Standish Place
Rockville, Maryland 20855

Dear Mr. Buehler:

We write on behalf of our client, Apotex, Inc., to bring to your attention certain patent information of relevance in connection with Teva v. Sebelius, No. 09-528 (D.C.Cir. Mar. 2, 2010) and the approval of Apotex, Inc.'s pending ANDAs referencing Hyzaar and Cozaar. Specifically, Teva Pharmaceuticals USA, Inc. has claimed an entitlement to 180-day exclusivity as a result of its certification to Merck's U.S. Patent No. 5, 608, 075 ("the '075 patent"). That patent, however, has expired. In fact, according to the United States Patent & Trademark Office ("USPTO"), the '075 patent expired at least as of March 30, 2009. The patent expired as a matter of law pursuant to 35 U.S.C. § 41(b) for failure to pay maintenance fees. Attachment A is a printout of the USPTO's Patent Application Information and Retrieval website reflecting that the '075 patent expired. Attachment B is a copy of the USPTO Official Gazette dated April 21, 2009 which, on page 5, reports that the '075 patent expired.

As Merck & Co., Inc., the patent holder, disclaimed the '075 patent in 2005 (Attachment C) and requested some time ago that this patent be delisted from the Orange Book altogether, it is not surprising that Merck did not update patent expiration information.

We have no objection to the public dissemination of this letter, or the information contained herein.

Sincerely,

Carmen M. Shepard
Kate C. Beardsley

cc: Elizabeth H. Dickinson, Esq.
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